(18,990.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 339.

HENNING JACOBSON, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Cambridge, within and for the county of Middlesex, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The Commonwealth of Massachusetts, by complaint, plaintiff and Henning Jacobson defendant, in a plea of not guilty wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Henning Jacobson as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifteenth day of June in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.
By BENJ. H. BRADLEE, *Deputy Clerk.*

Allowed by
ALBERT MASON,
Chief Justice Superior Court.

[Endorsed:] 50. Commonwealth *vs.* Jacobson. Writ of error. Filed June 15, 1903.

2 COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *ss:*

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal the Superior Court.

In testimony whereof, I Theodore C. Hurd clerk of said superior court, have hereto set my hand and the seal of said court this twenty-third day of June A. D. 1903.

THEO. C. HURD, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS:

At the third district court of Eastern Middlesex, in the county of Middlesex, holden in Cambridge, in said county, on the twenty-third day of July in the year of our Lord one thousand nine hundred and two Samuel W. McDaniel Esquire, special justice of said court, present and holding the court.

Henning Jacobson is brought before said court in due form of law, to answer to the Commonwealth of Massachusetts, on a complaint, a true copy of which said complaint is as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *To wit:*

To the third district court of Eastern Middlesex, holden at Cambridge for the transaction of criminal business, within the county of Middlesex:

E. Edwin Spencer of Cambridge in said county, in behalf of the Commonwealth of Massachusetts, on the seventeenth day of July in the year of our Lord one thousand nine hundred and two on oath complains that the board of health of the city of Cambridge in said county, being of the opinion that it was necessary for the public health and safety, did require the vaccination and revaccination of all the inhabitants thereof who had not been successfully vaccinated since the first day of March in the year of our Lord one thousand eight hundred and ninety-seven, and did provide them with the means of free vaccination and that Henning Jacobson being over twenty-one years of age and not under guardianship, did refuse and neglect to comply with such requirement.

E. EDWIN SPENCER.

MIDDLESEX, *ss:*

Received and sworn to, on said day, before said court.
HERBERT J. SPLAINE,
Assistant Clerk.

4 Which complaint being read to and heard by the said respondent he is asked by the court whether he is guilty or not guilty of the offence charged against him in the said complaint, who pleads and says that he is not guilty.

After hearing the witnesses in the case duly sworn, and fully hearing and understanding the defence of the said defendant, it appears to the court that he is guilty of the offence aforesaid.

It is therefore considered and ordered by the court, that the said respondent for the offence aforesaid, forfeit and pay a fine of five dollars to the use of said Cambridge and that he stand committed until sentence be performed.

From this judgment and sentence the said Jacobson appeals to the superior court, for the transaction of criminal business, next to be holden at Cambridge, within and for said county of Middlesex, on the first Monday in August next, and is ordered to recognize in the sum of two hundred dollars, with surety to appear at said superior court, and there prosecute his appeal, and abide the order and sentence of the court thereon, and also in like manner personally to appear at any subsequent term of said superior court, to which the proceedings in the premises may be continued, if not previously surrendered and discharged, and so from term to term, until the final decree, sentence or order of said superior court thereon, and to abide such final sentence, order, or decree of said superior court, and not depart without leave, and in the meantime to keep the peace and be of good behavior, and stand committed until he so recognize.

5 And thereupon the said Jacobson as principal, before said third district court of Eastern Middlesex, with George A. Giles as surety recognized according to the said order.

Attest: —— ——, *Clerk.*

A true copy of record—
Attest, my hand and the seal of said third district court of Eastern Middlesex.
[L. S.] —— ——, *Clerk.*

6 *Recognizance of Respondent.*

COMMONWEALTH OF MASSACHUSETTS, *Middlesex,* } *ss:*

Third District Court of Eastern Middlesex.

[L. S.]

MEMORANDUM.—That on the twenty-third day of July in the year of our Lord one thousand nine hundred and two Henning Jacobson

with George A. Giles, 67 Austin St. Cambridge Mass., personally appeared before the third district court of Eastern Middlesex, within and for the county of Middlesex, and acknowledged themselves to be severally indebted to the Commonwealth of Massachusetts, in the sums following, to wit: the said Jacobson as principal in the sum of two hundred dollars, and the said Giles as surety in the sum of two hundred dollars, to be levied on their goods, chattels, lands or tenements, and in want thereof, upon their bodies, to the use of the said Commonwealth, if default be made in the performance of the condition following:

The condition of this recognizance is such that whereas the said Jacobson is now before our said district court, in due form of law, to answer to the Commonwealth of Massachusetts, on the complaint under oath of E. E. Spencer charging said respondent with the crime of refusing vaccination.

Which complaint being read in open court, the said respondent is asked by the court whether he is guilty or not guilty of the offence charged in said complaint; who pleads and says that he is not guilty. But, after due examination and hearing the defence of said respondent, it thereupon appearing to said court that the said re-
7 spondent is guilty of the offence aforesaid, it is considered and ordered by the court that the said respondent forfeit and pay a fine of five dollars, and that he stand committed until this sentence be performed. From which said judgment the said respondent appeals to the superior court next to be holden at Cambridge, within and for the county of Middlesex, on the first Monday of August next; and it is ordered by said district court that the said respondent recognize in the sum of two hundred dollars, with sufficient surety in the like sum, to appear at the court appealed to, and prosecute his appeal and abide the sentence of the court thereon; and in like manner personally to appear at any subsequent term of said court, to which proceedings in the premises may be continued if not previously surrendered or discharged; and so from term to term until the final decree, sentence or order of the court thereon; and to abide such final sentence, order or decree of the court, and not depart without leave; and, in the meantime, to keep the peace and be of good behavior.

Now, therefore, if the said respondent shall appear at the court appealed to, and there prosecute his appeal, and abide the sentence of the court thereon; and in like manner personally appear at any subsequent term of said court to which the same may be continued, and so from term to term until the final decree, sentence or order of the court thereon, and shall abide such final sentence, order or decree, and not depart without leave, and, in the meantime, shall keep the peace and be of good behavior, then this recognizance shall be void, otherwise in full force.

Attest:

____ ____,

Clerk of the Third District Court of Eastern Middlesex.

8 Said appeal was entered in said superior court on the first Monday of August, A. D. 1902, when and where said defendant Jacobson duly appeared by J. W. Pickering, his attorney. Thence said case was continued to the February sitting A. D. 1903, to wit, February twenty-seventh, A. D. 1903, when and where said defendant Jacobson appeared and for trial thereof put himself upon the country. A jury was thereupon empanelled and sworn to try the issue, viz:—Francis Bellew, foreman, appointed by the court, and fellows, to wit:—Michael Casey, Junior, Ernest M. Dean, William D. Erskine, Philip A. Goodrich, Henry E. Hunt, Louis Locke, Peter McGrath, Henry W. Ripley, Roger Sherman, Andrew F. Smith, and Alexander M. Upham, who after hearing all matters and things concerning the same returned their verdict therein and upon their oath said that said Henning Jacobson was guilty. Thereupon on the second day of March, A. D. 1903, said defendant, by his attorneys, alleged sundry exceptions to the rulings and opinions of the court in certain matters of law, as follows to wit:—

9 COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *ss.*:

Superior Court, February Sitting, 1903.

COMMONWEALTH. }
vs.
HENNING JACOBSON. }

Defendant's Exceptions.

Complaint under section 137 of R. L., chapter 75, brought to this court by appeal from the third district court of Eastern Middlesex, where the defendant pleaded not guilty, and on trial was found guilty and sentenced to pay a fine of five dollars.

A copy of the complaint is hereto annexed, marked "A," and made a part of this bill of exceptions; and a copy of the record of proceedings may be referred to.

In this court, the defendant being arraigned, pleaded not guilty, and was se-t to the bar to be tried.

The Government put in evidence the record of a vote of the board of health of the city of Cambridge, passed February 27, 1902, a copy whereof is hereto annexed, marked "B," and made part hereof; also, the record of a vote of the board of health passed March 19, 1902, a copy of which, so far as material, is hereto annexed, marked "C," and made part hereof; also, evidence tending to show that

10 E. Edwin Spencer, then the chairman of said board of health, on or about the fifteenth day of March, 1902, called upon the defendant and informed him that if he refused to be vaccinated he would incur the penalty of five dollars provided by the vaccination law, and would be prosecuted therefor, and then and there offered to vaccinate defendant without any expense to him; but that the defendant then and there absolutely refused to be vaccinated.

This was all the evidence offered by the prosecution.

The defendant then offered to prove and show, by competent evidence, the following facts:

1. That vaccination, as usually performed, is an operation that quite often causes or results in a serious and permanent injury to the health of the person vaccinated.

2. Also, that it is an operation which occasionally causes and results in the death of the vaccinated person.

3. That among the diseases that are caused, or often result from vaccination, are eczema, salt rheum, erysipelas, syphilis, some forms of scrofula, paralysis, consumption, tetanus, and various forms of blood poisoning, including septicæmia and pyæmia, and some forms of insanity—all loathsome and dangerous diseases, to be dreaded and feared.

4. That it is impossible to tell in any particular case, what the results of vaccination will be, whether or not it will cause serious injury to the health, or result in the death of the vaccinated person.

5. That, as a rule, vaccination of a person results in a sickness more or less prolonged and serious, which renders the person vaccinated incapable of performing his usual duties and labors, whether physical or mental, for a longer or shorter time—sometimes incapacitating him for a period of several weeks, or even months—and this in cases where there is an ultimate complete recovery from the effects of the vaccination itself.

11 6. That it is a fact that quite often a person's blood is in such a condition of impurity, that it is not prudent or safe to vaccinate him while in that condition, and that it cannot be done at such a time without a risk or danger to his health or life.

7. Also, that there is no practical test by which it can be determined with any degree of certainty, when a person's blood is in such a condition of impurity as to render vaccination at such a time necessarily unsafe or dangerous.

8. That the so-called virus, or vaccine matter, or points, that is used for the purpose of vaccination, as manufactured and sold for use, quite often is impure and in a condition unfit and dangerous to be so used, and that there is no known practical test that can be resorted to by the ordinarily skillful and experienced practising physician, to determine whether or not the vaccine matter that is to be used, is pure and suitable to be used, or is by reason of its impurity, necessarily a source of danger if used at all.

9. That vaccination consists in inoculating the human system with a specific disease, known as cowpox, by means of the insertion into the human body—by incision and absorption—of various kinds of virus, commonly known as matter or pus, generally obtained from cowpox sores upon the bodies of calves (sometimes other animals) which have been infected with this disease for the purpose of generating this virus, pus or matter.

10. That numerous evil and dangerous effects are commonly produced upon human beings who are thus inoculated, by causing diseased conditions and diseases, including tetanus, or lockjaw, ulcers,

boils, eczema, erysipelas, abscesses, various forms of blood-poisoning, including septicæmia and pyæmia, and consumption, paralysis and syphilis.

11. That the nature of cowpox itself is not analagous to smallpox, but to greatpox, or syphilis, whence the syphilitic nature of the sores and symptoms of the sores produced.

12 12. That vaccination does not prevent the spread or contagion of smallpox; that the claim in behalf of vaccination that it is the only effectual or reliable safeguard or protection against smallpox, has never been demonstrated, for the reason that sanitation, isolation and disinfection have for a long time been developed and used to such an extent in connection with vaccination that it is impossible to ascribe the restrictive results accruing from the joint use of all these agencies to vaccination alone, and that in fact all the beneficial results in combating smallpox are fairly attributable to the other agencies above mentioned, and in no part to vaccination; that on the contrary, vaccination is a positive means of disseminating and spreading smallpox in the community.

13. That this defendant refused to submit to vaccination for the reason that he had, when a child, been caused great and extreme suffering, for a long period, by a disease produced by his vaccination at that time.

14. That he had witnessed a similar result of vaccination in the case of his own son, and had personally known a great number of other instances of the same kind, and that his said refusal was prompted by his knowledge of the danger and his dread of the terrible consequences of vaccination.

But the court ruled that each and all of the facts so offered to be proved by defendant were immaterial, and excluded each and all of them, and all of the evidence thus offered.

No further evidence was offered in the case.

Thereupon, the defendant asked the court to rule and instruct the jury as follows:

"That section 137 of chapter 75 of the Revised Laws is unconstitutional and void, and the refusal by defendant to comply with the requirements of the board of health here in evidence, constituted no offence, because:

"1. Said section is in derogation of the rights secured to the
13 defendant by the preamble to the Constitution of the United States, and tends to subvert and defeat the purposes of said Constitution, as there declared.

"2. Said section violates and infringes the rights secured to the defendant by article V. of the amendments of the Constitution of the United States; and especially the last clause of said article V., which reads as follows: 'Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.'

"3. Said section is in derogation of the rights secured to the defendant by article XIV. of the amendments of the Constitution of the

United States, and especially the last three clauses of section 1 of said article XIV., as follows: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the usual protection of the laws.'

"4. Said section is repugnant to the spirit of the Constitution of the United States.

"5. Said section, and the several provisions thereof, are repugnant and contrary to the constitution of this Commonwealth, and especially to the provisions of article I. of part the first of said constitution.

"6. Said section, and the several provisions thereof, are repugnant and contrary to the constitution of this Commonwealth, and in derogation of the rights of this defendant secured to him by article IV. of chapter 1 of part the second of said constitution, and especially of that part of it which reads as follows: 'Art. IV. And further, full power and authority are hereby given and granted to the said general court, from time to time to make, obtain and establish, all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or
14 without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government or ordering thereof, and of the subjects of the same.'

"7. Said section, and the several provisions thereof, are repugnant and contrary to the constitution of this Commonwealth, and especially to the provisions of article X. of part the first of said constitution.

"8. Said section, and the several provisions thereof, are repugnant and contrary to the constitution of this Commonwealth, and especially to the provisions of article XIV. of part the first of said constitution.

"9. Said section, and the several provisions thereof, are wholly repugnant and contrary to the constitution of this Commonwealth, and to the spirit of said constitution.

"10. That the regulation or order adopted by the board of health, under which this prosecution is brought, is, by its terms, unreasonable, and therefore void; and creates no offence of which the defendant is or can be guilty.

"11. That said regulation or order is more especially unreasonable in this, that it requires and compels the vaccination or re-vaccination of all the inhabitants of Cambridge, without any exceptions or limitations in respect of any of them."

And the defendant requested the court, upon the foregoing evidence, to order and direct the jury to return a verdict of not guilty.

But the court refused to give any of the rulings or instructions requested, and refused to order or direct a verdict of not guilty, and ruled and instructed the jury in substance that if they believed the evidence introduced by the Government, and were satisfied thereby

beyond a reasonable doubt that the defendant was guilty of the offence charged in the complaint, they would be warranted in finding a verdict of guilty.

The jury found and returned a verdict of guilty.

To all and singular the foregoing rulings and instructions, to the exclusion of the said evidence offered in behalf of the defendant, including each and all of the several offers of proof above enumerated and set forth, and to the refusal of the court to order and direct a verdict of not guilty, the defendant duly excepted, and now prays that his said exceptions may be allowed.

By his attorney, J. W. PICKERING.

Filed March 2, 1903.

March 2, 1903.—Allowed.

WILLIAM CUSHING WAIT, *J. S. C.*

"A."

COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *To wit:*

To the third district court of Eastern Middlesex, holden at Cambridge for the transaction of criminal business, within the county of Middlesex:

E. Edwin Spencer of Cambridge in said county, in behalf of the Commonwealth of Massachusetts, on the seventeenth day of July, in the year of our Lord one thousand nine hundred and two, on oath complains that the board of health of the city of Cambridge in said county, being of the opinion that it was necessary for the public health and safety, did require the vaccination and re-vaccination of all the inhabitants thereof who had not been successfully vaccinated since the first day of March, in the year of our Lord one thousand eight hundred and ninety-seven, and did provide them with the means of free vaccination, and that Henning Jacobson, being over twenty-one years of age and not under guardianship, did refuse and neglect to comply with such requirement.

E. EDWIN SPENCER.

MIDDLESEX, *ss:*

Received and sworn to, on said day, before said court.

HERBERT J. SPLAINE,
Assistant Clerk.

"B."

CAMBRIDGE, *February* 27, 1902.

Special Meeting of the Board of Health Held this Day at 12 *m.*

Present the full board.

Voted to pass the following regulation regarding vaccination, viz.: Whereas, smallpox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease, that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or re-vaccination of all the inhabitants of Cambridge; be it ordered that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or re-vaccinated.

The board then adjourned.

A true record.

Attest: JAMES B. SOPER, *Clerk.*

6

"C."

CAMBRIDGE, *March* 19, 1902.

Meeting of the Board of Health.

Voted: Whereas, the following physicians, to wit: —— Felix McGirr —— have been employed by the chairman of this board in the name of the board of health, to enforce the vaccination of
17 persons dwelling in this city in accordance with the vote passed by this board at its special meeting held February 27, it is hereby voted that the action of the chairman be and is hereby ratified, and that the said persons be and are constituted agents of this board for the purpose of vaccination from the dates of their engagement, to wit: —— Felix McGirr March 6, 1902, until otherwise ordered, and

Voted, that their compensation for services rendered be fixed at $2.00 per hour while occupied with vaccinating.

A true record.

Attest: JAMES B. SOPER, *Clerk.*

1903. February 27, verdict, guilty.

The foregoing are true copies.

Attest: THEO. C. HURD, *Clerk.*

18 [Endorsed:] Commonwealth *vs.* Henning Jacobson. Middlesex county Defendant's exceptions.

19 Thence said case was continued for the opinion of the supreme judicial court for said Commonwealth, when on the third day of April, A. D. 1903, it was ordered by said supreme judicial court for said Commonwealth, by its rescript, that the clerk of said superior court for said county of Middlesex make the following entry under said case in the docket of said court, viz:—

"Exceptions overruled.
By the court,

HENRY A. CLAPP, *Clerk.*

April 2, 1903.

Brief Statement of the Grounds and Reasons of the Decision.

The statute is constitutional.
The evidence excluded was immaterial."

Thence the case was continued to the present June sitting, A. D. 1903. And now, on this fifteenth day of June, A. D. 1903, it is considered by the court that the said Henning Jacobson pay to the use of said Commonwealth a fine of five dollars, and stand committed until paid. And on said fifteenth day of June, upon petition of said defendant, a writ of error was granted to the United States Supreme Court, accordingly. And on said fifteenth day of June, after the defendant had filed his writ of error and the bonds required and approved by the court, as hereinafter appears, said defendant was by order of the court discharged from the custody of the sheriff until further order of the court. Said petition is as follows, viz:—

20 COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *ss:*

Superior Court for Criminal Business.

COMMONWEALTH OF MASSACHUSETTS, Appellee in Error,
vs.
HENNING JACOBSON, Appellant in Error. } Petition for Writ of Error.

To the Honorable Albert Mason, chief justice of the superior court:

Your petitioner, the defendant in the above entitled cause, says that a verdict of guilty upon a complaint by the Commonwealth of Massachusetts was rendered against him in this court, and that exceptions were taken to the supreme judicial court where said exceptions were duly heard and overruled and thereupon final judgment was rendered against your petitioner in this court; and your petitioner complains that errors of law appear in the record of said cause and respectfully petitions for a writ of error to the Supreme Court of the United States, and that you will issue a citation to the Commonwealth of Massachusetts upon said writ of error, and herewith files his assignments of error as follows:—

(1.) The court erred in such judgment against your petitioner in that your petitioner requested the court to rule and instruct the jury, that section 137 of the Revised Laws chapter 75, under which section said complaint was brought, was unconstitutional and void, because said section is in derogation of the rights secured to the
21 defendant by the preamble to the Constitution of the United States, and tends to subvert and defeat the purposes of said Constitution as there declared, as appears of record in said cause, and that the court refused so to rule and instruct the jury.

(2.) That the court erred in such judgment against your petitioner in that your petitioner requested the court to rule and instruct the jury, that section 137 of chapter 75 of the Revised Laws was unconstitutional and void, because said section violates and infringes the rights secured to the defendant by article 5 of the amendments of the Constitution of the United States; and especially the last clause of said article 5 which reads as follows: "Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation," as appears of record in said cause, and that the court refused so to rule and instruct the jury.

(3.) The court erred in such judgment against your petitioner in that your petitioner requested the court to rule and instruct the jury, that section 137 of chapter 75 of the Revised Laws was unconstitutional and void, because said section is in derogation of the rights secured to the defendant by article 14 of the amendments of the Constitution of the United States, and especially by section 1 of said article, as appears of record in said cause, and that the court refused so to rule and instruct the jury.

(4.) The court erred in such judgment against your peti-
22 tioner in that your petitioner requested the court to rule and instruct the jury, that section 137 of chapter 75 of the Revised Laws was unconstitutional and void because said section was repugnant to the spirit of the Constitution of the United States, as appears of record in said cause, and that the court so refused to rule and instruct the jury.

(5.) That the court erred in such judgment against your petitioner in that your petitioner offered to prove and show by competent evidence each and all of the facts as set forth in your petitioner's bill of exceptions on pages 2 and 4 and numbered 1 to 14 inclusive, as appears of record in said cause, and the court ruled that each and all of said facts so offered were immaterial and excluded each and all of them. Because such evidence tended to prove that said section 137 of chapter 75 of the Revised Laws was unconstitutional and void because it violated and infringed the rights secured to your petitioner by the Constitution of the United States, and particularly by article 5 and section 1 of article 14 of the amendments of said Constitution.

By his attorney, GEO. FRED WILLIAMS.

Filed June 15, 1903.

23 And on said fifteenth day of June said defendant files the following bonds as required by law, viz:—

24 *Bond to Appear and Abide the Final Judgment in the Action.*

Know all men by these presents that we Henning Jacobson of Cambridge in the county of Middlesex and Commonwealth of Massachusetts as principal, and George A. Giles of Cambridge in the county of Middlesex and John P. Wiedemann of Cambridge in the county of Middlesex, both in said Commonwealth, as sureties are held and firmly bound unto the Commonwealth of Massachusetts in the full and just sum of $100 to be paid to the said Commonwealth of Massachusetts to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

The form of the bond and the sufficiency of the sureties are satisfactory. Hugh Bancroft, assistant district attorney, northern district.

Whereas lately at a hearing before the superior court of the Commonwealth of Massachusetts holden at Cambridge within and for the county of Middlesex, for the transaction of criminal business in a suit pending in said court between the Commonwealth of Massachusetts by complaint, and Henning Jacobson, judgment was entered against the said Henning Jacobson, and the said Henning Jacobson having procured a writ of error and filed a copy thereof in the clerk's office of the superior court to reverse the judgment of the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington within thirty days from the date of said writ of error. Having given a bond in the sum of $100 to the Commonwealth of Massachusetts to prosecute the said writ of error to effect and answer all damages and costs if he fail to make his plea good,

Now, therefore, if the said Henning Jacobson shall prosecute his said writ of error to effect and shall, if unsuccessful, in the
25 prosecution of his said writ of error, appear before the superior court of the Commonwealth of Massachusetts, holden at Cambridge within and for the county of Middlesex for the transaction of criminal business, and abide the final judgment in said action and shall not avoid, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this fifteenth day of June, A. D. 1903.

HENNING JACOBSON. [SEAL.]
GEORGE A. GILES. [SEAL.]
JOHN P. WIEDEMANN. [SEAL.]

Signed and sealed in presence of
GEO. FRED WILLIAMS.

Approved
ALBERT MASON,
Chief Justice of Superior Court.

26 *Bond to Prosecute Writ of Error to Effect*

The form of the bond and the sufficiency of the sureties are satisfactory. Hugh Bancroft, assistant district attorney, northern district.

Know all men by these presents that we Henning Jacobson of Cambridge in the county of Middlesex and Commonwealth of Massachusetts as principal, and George A. Giles of Cambridge in the county of Middlesex and John P. Wiedemann of Cambridge in the county of Middlesex both in said Commonwealth, as sureties are held and firmly bound unto the Commonwealth of Massachusetts in the full and just sum of $100. to be paid to the Commonwealth of Massachusetts to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Whereas lately at a hearing before the superior court of the Commonwealth of Massachusetts holden at Cambridge within and for the county of Middlesex for the transaction of criminal business in a suit pending in said court between the Commonwealth of Massachusetts by complaint, and said Henning Jacobson, judgment was entered against the said Henning Jacobson, and the said Henning Jacobson having procured a writ of error and filed a copy thereof in the clerk's office of said superior court to reverse the judgment of the aforesaid suit and a citation directed to the said Commonwealth citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington within thirty days from the date of said writ of error.

Now, therefore, the consideration of the above obligation is such, that if the said Henning Jacobson shall prosecute his said writ of error to effect and answer all damages and costs if he fail to
27 make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this fifteenth day of June A. D. 1903.

HENNING JACOBSON. [SEAL.]
GEORGE A. GILES. [SEAL.]
JOHN P. WIEDEMANN. [SEAL.]

Signed and sealed in presence of
GEO. FRED WILLIAMS.

Approved
ALBERT MASON,
Chief Justice of the Superior Court.

28 COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } ss:

Superior Court.

Docket Record.

COMMONWEALTH *vs.* HENNING JACOBSON. } 50. Appeal, Refusing Vaccination.

J. W. Pickering.
Geo. Fred Williams.
James A. Halloran.

1902, August. 1903, February 27.—Verdict guilty.
March 2.—Defendant's exceptions and allowed. (Law)
April 3.—Rescript—"Exceptions overruled."
June 15.—Sentence $5.
Upon the filing of the writ of error, and the bonds required and approved by the court, said defendant was, by order of the court discharged from the custody of the sheriff until further order of the court. Petition for writ of error to United States Supreme Court and assignment of error. Bond to appear in $100. and to prosecute writ of error in $100.—approved.

29 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *June 10th*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of Commonwealth *vs.* Albert M. Pear Commonwealth *vs.* Henning Jacobson decided on the 2nd day of April, 1903.

HENRY WALTON SWIFT,
Reporter of Decisions.

30 KNOWLTON, *C. J.*:

These are complaints against the respective defendants for refusing to comply with a requirement of the board of health of Cambridge, made on February 27, 1902, under the R. L. c. 75, sec. 137, ordering that all the inhabitants of the city, who had not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated. The order recites that small pox has been prevalent to some extent in the city of Cambridge, and still continues to increase; that it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and that, in the opinion of the board, the public health and safety require the vaccination or revaccination of all of the inhabi-

tants of Cambridge. At the trial of each case there was uncontradicted evidence of the adoption of the order making the requirement by the board of health, and that the chairman of the board of health called upon the defendant and informed him that if he refused to be vaccinated he would incur the penalty of $5 provided by the statute, and would be prosecuted therefor, and then and there offered to vaccinate the defendant without any expense to him, and that he then and there absolutely refused to be vaccinated. The requirement of the board of health follows exactly the provisions of the statute. In each case the defence principally relied on is founded upon the refusal of the court to comply with numerous requests for rulings, which, in a variety of forms, called for an instruction that the statute was in violation of the constitution of Massachusetts and of the Constitution of the United States.

In the second of the cases there is also an exception to the exclusion of evidence offered by the defendant to prove numerous propositions in regard to vaccination, chiefly relating to the alleged injurious and dangerous effects of it. We will consider the cases first in reference to the constitutionality of the statute, without regard to the evidence which was excluded. This statute is as follows: "The board of health of a city or town, if in its discretion it is
31 necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all of the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over twenty one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars." Its language, considered in connection with facts of common knowledge, makes its object plain. It was enacted with a view to the enforcement of necessary measures for the prevention of small pox. That such an object is worthy of the intelligent thought and earnest endeavor of legislators is too plain for discussion. Under the police power there is general legislative authority to make laws for the common good. Article 4 of chapter 1 of the constitution of Massachusetts states more fully than most constitutions the nature of this power, when it gives authority to "the general court from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth," etc. That this power extends to the protection and preservation of the public health is not questioned. Salem *v.* Eastern Railroad, 98 Mass. 431. Slaughter House cases, 16 Wall., 36, 62. Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 33. Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 669. The rights of individuals must yield, if necessary, when the welfare of the whole community is at stake. This is true of the right to personal liberty as well as the right to property. People *v.* Warden of City Prison, 144 N. Y. 529, 535. Sometimes it is necessary that persons be held in quarantine. R. L. c. 75, sec. 131. Haverty *v.* Bass, 66 Maine, 71. Minneapolis Railway

v. Milner, 57 Fed. Rep. 276. Conscription may be authorized if the life of the nation is in peril. See Lanahan *v.* Birge, 30 Conn. 438. The use or sale of certain kinds of property may be regulated or prohibited. Fisher *v.* McGirr, 1 Gray, 1. Commonwealth *v.* Waite, 11 Allen, 264. Watertown *v.* Mayo, 109 Mass. 315. Fertilizing Co.
32 *v.* Hyde Park, 97 U. S. 659. Mugler *v.* Kansas, 123 U. S. 652. In these and other ways the liberty of the individual may be interfered with whenever the general welfare requires a course of proceedings to which certain persons object because of their peculiar opinions or special individual interests.

It is a fact of common knowledge that small pox is a terrible disease whose ravages have sometimes swept away thousands of human beings in a few weeks. It is equally well known that a large majority of the medical profession and of people generally consider vaccination, repeated at intervals of a few years, a preventive of the disease. So far as we are aware, all courts that have considered the subject have recognized the right of the legislature to enact laws founded upon the theory that vaccination is important as a preventive of smallpox, and to impose restrictions, during an epidemic, upon persons who have not been vaccinated. There are some cases in which it has been held that the statute did not go far enough to authorize the restrictions which the authorities sought to impose. *In re* Smith, 146 N. Y. 68. Adams *v.* Burdge, 95 Wis. 390. Potts *v.* Breen, 167 Ill. 67. Matthews *v.* Board of Education, 127 Mich. 530. But these assume that the legislature may interfere with the exercise of the ordinary rights of individuals if they are not vaccinated when smallpox is prevalent. Legislation requiring vaccination or authorizing some local board to require it, as a prerequisite to attendance at school, has been sustained whenever called in question. Duffield *v.* School District, 162 Penn. St. 476. Bissell *v.* Davison, 25 Conn. 183. Abeel *v.* Clark, 84 Cal. 226. Blue *v.* Beach, 155 Ind. 121. *In re* Walters, 84 Hun., 457. *Re* Rebenack, 62 Mo. App. 8. Legislation requiring vaccination is mentioned as a proper exercise of the police power in Lawton *v.* Steele, 152 U. S., 133, 136. Statutes substantially the same as the one now before us have been sustained, after careful consideration, by the highest courts of Georgia and North Carolina. Morris *v.* Columbia, 102 Ga. 792. State *v.* Hay, 126 N. C. 999. Levin *v.* Burlington, 129 N. C. 184.

Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he
33 offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. Commonwealth *v.* Connolly, 163 Mass. 539. Commonwealth *v.* Has, 122 Mass. 40. Reynolds *v.* United States, 98 U. S.

145. Regina *v.* Downes, 13 Cox, C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant "offered to prove and show by competent evidence," these so-called facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only "competent evidence" that could be presented to the court to prove these propositions, was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in Commonwealth *v.* Anthes, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of small pox; that while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of
34 such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands.

An elaborate argument has been addressed to us upon the effect of the quoted words, "wholesome and reasonable" in our constitution. It is at least doubtful whether these words, considered in connection with accompanying provisions, restrict our general court in the exercise of the police power, otherwise than by the constitutional limitations upon this power which exist under the constitutions of most of the other States of this country. It is generally held that if a statute purports to be enacted to promote the general welfare of the people, and is not at variance with any provision of the constitution, the question whether it will be for the good of the community is a legislative, and not a judicial question. Powell *v.* Pennsylvania, 127 U. S. 678, 684, 686. Yick Wo *v.* Hopkins, 118 U. S. 356, 370, 371. Mugler *v.* Kansas, 123 U. S. 623, 662. Bancroft *v.* Cambridge, 126 Mass. 438, 441. Commonwealth *v.* Blackington, 24 Pick. 352, 357. Commonwealth *v.* Alger, 7 Cush. 53, 96, 102. Watertown *v.* Mayo, 109 Mass. 315. Opinion of Justices, 163

Mass. 589, 595. *In re* Jacobs, 98 N. Y. 98, 110. People *v.* Gillson, 109 N. Y. 389, 401. If a law relates to a subject in regard to which the general court is authorized to legislate, this court is not justified in setting aside the statute as unreasonable and unconstitutional merely because the judges differ in opinion from the legislators on the question whether it will "be for the good and welfare of this Commonwealth."

35 But if a statute invades personal rights to liberty or property, and is not directed to the promotion of the general welfare, but is an evasion of the principles on which legislative action should be founded, and by which it should be regulated, and is thus an abuse of legislative power, it should be declared unconstitutional.

We see no reason for regarding the present statute as outside of legislative authority to enact it. Plainly it is wholesome and reasonable in the sense that it relates to a subject about which the legislature may well concern itself. There is no reason for holding that the measures authorized by it do not relate directly to the promotion of the intended object. The theoretical possibility of an injury in an individual case as a result of its enforcement does not show that as a whole it is unreasonable. The application of a good law to an exceptional case may work hardship. There is no reason to suppose that the enforcement of the requirement, in the present case, was conducted harshly. Naturally there would be regard to temporary conditions, if they became important, as to the time and manner of its enforcement. If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, it is not in their power to vaccinate him by force, and the worst that could happen to him under the statute would be the payment of the penalty of $5.

The defendant's contention that the statute works unequally, in making an exception of minors and persons under guardianship, is not well founded. It only limits the liability to a penalty for neglect of the requirement to persons who have a right to control their own conduct.

We are of opinion that the statute is constitutional and that there was no error at the trial. In each case the entry must be

Exceptions overruled.

36 [Endorsed:] Com. *vs.* Pear Com. *vs.* Jacobson. Certified copy of the opinion of the supreme judicial court. Middlesex *ss.* Jun- 15 1903 Filed in clerk's office.

37 COMMONWEALTH OF MASSACHUSETTS, } *ss.*:
Middlesex, }

I, Theodore C. Hurd, clerk of the superior court within and for said county of Middlesex, hereby certify that the foregoing are true copies of

I. The record in the case of

COMMONWEALTH
vs.
HENNING JACOBSON

II. The docket record
III. The opinion of the full court;
And of all the proceedings in said case, with all things concerning the same.

In witness whereof, I hereunto set my hand and affix the seal of said superior court, this twenty-third day of June in the year of our Lord one thousand nine hundred and three.

[Seal the Superior Court.]

THEO. C. HURD, *Clerk.*

38 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, in the city of Washington, District of Columbia, *within thirty days from the date hereof next, pursuant to a writ of error filed in the clerk's office of the † superior court of the county of Middlesex and Commonwealth of Massachusetts wherein Henning Jacobson of Cambridge in said county of Middlesex is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason chief justice of the superior court of Massachusetts, this fifteenth day of June, in the year of our Lord one thousand nine hundred and three.

ALBERT MASON,
Chief Justice, Superior Court.

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* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

39 Service of the within citation is hereby accepted for the Commonwealth of Massachusetts.

FREDERICK H. NASH,
Assistant Attorney General of Massachusetts.

40 UNITED STATES OF AMERICA:

Supreme Court of the United States.

HENNING JACOBSON, Plaintiff in Error,
vs.
COMMONWEALTH OF MASSACHUSETTS, Defendant in Error.

Assignment of Errors.

On this fifteenth day of June A. D. 1903 comes the said Henning Jacobson by Geo. Fred. Williams & James A. Halloran, his attorneys, and shows that in the record and proceedings in said cause there is manifest error in this, to wit:—

(1.) The court erred in such judgment against your petitioner in that your petitioner requested the court to rule and instruct the jury, that section 137 of chapter 75 of the Revised Laws of the Commonwealth of Massachusetts, under which section said complaint was brought, was unconstitutional and void, because said section is in derogation of the rights secured to the defendant by the preamble to the Constitution of the United States, and tends to subvert and defeat the purposes of said Constitution as there declared, as appears of record in said cause, and that the court refused so to rule and instruct the jury.

(2.) That the court erred in such judgment against your petitioner in that your petitioner requested the court to rule and instruct the jury, that section 137 of chapter 75 of the Revised Laws of the Commonwealth of Massachusetts, was unconstitutional and void, because said section violates and infringes the rights secured to the defendant by article 5 of the amendments of the Constitution of the United States; and especially the last clause of said article 5 which reads as follows: "Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property
41 without due process of law; nor shall private property be taken for public use without just compensation," as appears of record in said cause, and that the court refused so to rule and instruct the jury.

(3.) The court erred in such judgment against your petitioner in that your petitioner requested the court to rule and instruct the jury, that section 137 of chapter 75 of the Revised Laws of the Commonwealth of Massachusetts was unconstitutional and void, because said section is in derogation of the rights secured to the defendant by article 14 of the amendments of the Constitution of the United States, and especially by section 1 of said article, as appears of record in said cause, and that the court refused so to rule and instruct the jury.

(4.) The court erred in such judgment against your petitioner in that your petitioner requested the court to rule and instruct the jury, that section 137 of chapter 75 of the Revised Laws of the Commonwealth of Massachusetts was unconstitutional and void because said section was repugnant to the spirit of the Constitution of the United States, as appears of record in said cause, and that the court refused so to rule and instruct the jury.

(5.) That the court erred in such judgment against your petitioner in that your petitioner offered to prove and show by competent evidence each and all of the facts as set forth in your petitioner's bill of exceptions on pages 2 and 4 numbered 1 to 14 inclusive, as appears of record in said cause, and the court ruled that each and all of said facts so offered were immaterial and excluded each and all of them. Because such evidence tended to prove that said section 137 of chapter 75 of the Revised Laws of the Commonwealth of Massachusetts was unconstitutional and void because it violated and infringed the rights secured to your petitioner by the Constitution of the United States, and particularly by article 5 and section 1 of article 14 of the amendments of said Constitution.

HENNING JACOBSON,
By his attorneys, GEO. FRED. WILLIAMS,
JAMES A. HALLORAN.

42 [Endorsed:] United States of America Supreme Court of U. S. In error to superior court of the Commonwealth of Massachusetts Henning Jacobson, pl'ff in error *v.* Commonwealth of Massachusetts, def't in error. Assignment of errors. From the office of Geo. Fred. Williams & James A. Halloran, r'm 50, No. 209 Wash. St., Boston, Mass.

43 UNITED STATES OF AMERICA:

Supreme Court of the United States.

HENNING JACOBSON, Appellee in Error,
vs.
COMMONWEALTH OF MASSACHUSETTS, Appellant in Error.

Prayer for Reversal.

In the above entitled cause for manifest error that happened therein, as appears in the petition of said appellant in error for a writ of error to said Supreme Court of the United States, and as more particularly appears in the assignment of errors filed therein, said appellant in error prays that the final judgment rendered in said cause in the superior court for the county of Middlesex and Commonwealth of Massachusetts may be reversed.

HENNING JACOBSON,
By his attorneys, GEO. FRED. WILLIAMS,
JAMES A. HALLORAN.

44 [Endorsed:] United States of America. Supreme Court of the United States Henning Jacobson, appellee in error, *v.* Commonwealth of Mass., appellant in error. Appellant's prayer for the reversal of judgment. From the office of Geo. Fred Williams & James A. Halloran, r'm 50, No. 209 Wash. St. Boston Mass.

Endorsed on cover: File No. 18990. Massachusetts superior court. Term No. 339. Henning Jacobson, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed June 29, 1903.